

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

TWIN AMERICA, LLC, and JAD
TRANSPORTATION, LLC.
EMPLOYER

And
LOCAL 225, TRANSPORT WORKERS
UNION OF AMERICA,
PETITIONER

Case No. 02-RC-159028

And
UNITED SERVICE WORKERS UNION,
LOCAL 1212, IUJAT,
INTERVENOR.

**INTERVENOR, UNITED SERVICE WORKERS UNION, LOCAL 1212's
REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL
DECISION ON OBJECTIONS AND CHALLENGES AND
DIRECTING THE COUNTING OF BALLOTS DATED MAY 24, 2016**

Preliminary Statement

The Regional Director's Supplemental Decision in this case calls out for review by the Board because it damages the integrity and public perception that lie at the heart of all Board sponsored election processes. It presents a substantial question of law and board procedures in that it mistakenly delegates to election observers, responsibilities that belong exclusively to the Board. In the instant case, the Regional Director mistakenly placed the burden on observers in a large, complicated election, to provide for and ensure the proper identification of voters, which resulted in unidentified voters voting, challenged ballots being misidentified and potentially affecting the outcome of a large election by the narrowest of margins. The Regional Director excuses the failure to provide for the proper identification of voters by simply finding, "[I]ntevenor's observers challenged voters and requested identification from some voters", thereby placing a burden on observers the Act and the Board's rules never intended.

The Regional Director's decision also misapplied the standard set forth in *Boston Insulated Wire*, 259 NLRB 1118 (1982), as it related to one party's observer instructing a voter where to mark the ballot within earshot of other voters waiting on line to vote.

Rule Concerning Request for Review

Section 102.67(d) of the Board's Rules and Regulations provides that the grounds for granting a Request for Review include:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) departure from, officially reported Board precedent.
- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

The Regional Director's ruling that the Intervenor failed to meet its burden of showing that the lack of additional voter identification (that is, other than self-identification) would warrant setting aside the election, thereby denying Intervenor's Objection 2, departs from the Board's rules and regulations set forth in its Case Handling Manual, Section 11312.4 as it fails to acknowledge a Board Agent's obligation to explore with the parties, "[i]n sufficiently large or complex cases...in advance of the election the identifying information to be utilized by voters as they approach the checking table" and, "If agreement is not reached between/among the parties, the Regional Director should consider whether to require identifying information in addition to self-identification by voters." It is also contrary to *Avondale Industries v. NLRB*, 180 F.3d 633. The Regional Director's delegation of and reliance on observers to ensure proper identification of voters in a large and complex case is inconsistent with the Region's obligations under these procedures and the controlling law.

The Regional Director's ruling that Petitioner's observer's instructions to a voter in the presence of others waiting on line to vote and denying Intervenor's Objection 3, wrongly applied the Board's precedent in *Boston Insulated Wire*, 259 NLRB 1118 (1982)

Statement of the Case

Based on a petition filed on August 31, 2015 and pursuant to a Stipulated Election Agreement approved on September 9, 2015 an election was conducted on September 18, 2015 to

determine whether a unit of employees employed by Twin America, LLC and JAD Transportation, Inc. (“Twin America” and “JAD”, respectively) wished to be represented by TWU Local 225 (“Local 225” or “Petitioner”) or USWU Local 1212 (“Local 1212” or “Intervenor”). Twin America and JAD had each, historically, operated independent New York City sightseeing operations known as Gray Lines and City Sights, respectively, and employed their own groups of ticket agents and tour guides in connection with such operations. This petition resulted from the merger of these two operations and their workforces. For the purpose of this case, Twin America and JAD stipulated that they were joint employers of the merged bargaining unit.

Prior to this merger and election, Local 1212 was the exclusive representative of the City Sights ticket agents and tour guides employed by JAD¹ and the Gray Lines ticket agents and tour guides employed by Twin America Gray Lines were represented by Local 225.

The tally of ballots from the election showed that of approximately 614 eligible voters, there were 2 void ballots, 236 votes were cast for the Petitioner, 174 for the Intervenor and 7 for neither union. There were 85 challenged ballots inclusive of 74 pre-announced challenged voters by the Petitioner.² Following an investigation of the challenged ballots by the Region, pursuant to a stipulation entered into by the parties on October 14, 2015, Local 225 withdrew its challenge to 29 of its 74 pre-announced challenged voters, those ballots were counted and a revised tally of ballots was issued. The revised tally showed of the approximately 614 eligible voters there were

¹ Local 1212 also represents the City Sights bus drivers employed by JAD, but they are not affected by this election.

² The 74 pre-announced challenges were composed of two distinct groups of ticket sellers, one which Local 225 claimed were independent contractors and one, so called “purple vests” which it claimed were not ticket agents because, *inter alia*, they sold different event tickets. Local 225 eventually withdrew these challenges without the need for a hearing.

2 void ballots, 236 votes were cast for the Petitioner (no change from the original tally), 203 for the Intervenor (all 29 counted ballots were cast for Local 1212) and 7 for neither union. There remained 53 challenged ballots, a number sufficient to affect the results of the election.

Following additional investigation of the remaining challenges by the Region, pursuant to a second stipulation entered into by the parties on November 30, 2015 Local 225 withdrew its challenge to the “purple vest” ticket agents, those ballots were counted and a second revised tally of ballots was issued. The second revised tally showed of the approximately 614 eligible voters there were 2 void ballots, 236 votes were cast for the Petitioner (still no change from the original tally), 246 for the Intervenor (all 43 counted ballots were cast for Local 1212) and 7 for neither union. There remained 9 challenged ballots, a number sufficient to affect the results of the election.³

Local 1212 timely filed three (3) objections to the conduct of the election. The second and third objections are the subject of this Request for Review and are:

2. Voters were not required to adequately identify themselves resulting in ineligible people voting and voter misidentification.
3. A Local 225 observer instructed voters to fill in the ballot by marking off the space for Local 225.

Beginning on December 21, 2015, a hearing was held on the outstanding challenges and objections to the election. As reported in the Regional Director’s Supplemental Decision, p.1, at the hearing the parties entered into a stipulation resolving three (3) of the outstanding

³ The closeness of the election became immediately apparent. There were 499 valid ballots cast as of that date. Neither Union, therefore, had yet received over a majority of the ballots needed to win the election. Thus, the 9 remaining unresolved challenged ballots were sufficient to affect the outcome of the election.

challenged⁴ ballots leaving six (6) unresolved challenges. On April 13, 2016, the Hearing Officer issued her Report on Objections and Challenged Ballots recommending, inter alia, that Local 1212's second and third objections to the election be overruled. The Intervenor filed exceptions to the recommendation that its second and third objections be overruled, but the Regional Director affirmed and adopted the Hearing Officer's recommendations. The Hearing Officer also recommended that three (3) of the remaining six (6) challenged ballots be opened and counted and three (3) challenged ballots be sustained and not counted. The Regional Director affirmed the Hearing Officer's rulings on these six (6) challenged ballots.

The Regional Director's rulings on challenged ballots bring the closeness of this election into even closer focus. If the Regional Director's rulings upholding the challenges to three (3) of them are sustained, 496 total valid ballots will have been cast with six (6) remaining ballots to be opened. Given the current vote tally, even if it garnered all six (6) of the remaining votes, the Petitioner could not win the election, but by capturing only three (3) of the six remaining votes the Intervenor would be the winner. Thus, the material and substantial implications of the Intervenor's objections in an election of nearly 500 voters that may very well be decided by only one or two of votes is readily apparent.

ARGUMENT

Point 1. *The buck stops with the NLRB to provide for the proper conduct of an election.*

The Regional Director Erred in Overruling Intervenor's Second Objection

Local 1212's second objection to the election goes to the heart of the NLRB's obligation to conduct a fair election in which only eligible voters are permitted to vote. The integrity of the

⁴ The parties agreed the ballots of Michael Perez, John Salazar and Christa Burkhardt should be counted.

Board's processes and public perception of its fairness demand no less. Central to this duty is the obligation to ensure that only eligible voters are allowed to vote. Acknowledging this, the issue of adequate identification of voters is addressed in the NLRB's Case Handling Manual.

Case Handling Manual, Section 11312.4, provides:

In sufficiently large or complex cases the Board agent should explore with the parties in advance of the election the identifying information to be utilized by voters as they approach the checking table. If agreement is not reached between/among the parties, the Regional Director should consider whether to require identifying information in addition to self-identification by voters.

This case presented a sufficiently large or complex case requiring voter identification in addition to self-identification. This was a large case as it involved over 600 potentially eligible voters. The petition listed 575 people in the petitioned for unit and the Voters List included over 600. The Region knew that this was a complex case because it fully investigated and resolved a UC petition filed by TWU Local 225 earlier in the year, Case No. 2-UC-152202, in which it unsuccessfully sought to accrete the Local 1212 members into its bargaining unit after the merger of the Gray Lines and city Sights operations. On July 17, 2015, only six weeks before the filing of the petition herein, the Region approved the withdrawal of that petition after conducting its own detailed investigation into the facts and circumstances of the merger and evaluation of the several different bargaining units involved. The Regional Director should have taken "judicial notice" of that case and considered it upon the filing and consideration of the petition in this case.

The complexity of this case, which was known to the Region from its investigation and solicited withdrawal of the UC case, related to the fact that it involved the corporate restructuring of Twin America, LLC and the merger/rebranding of the separate operating entities of Gray Line Bus tours and City Sights tours. The employees of each operating entity were represented by

three different Unions – the competing Unions in the instant case, plus the Teamsters.⁵ Each of the merging bargaining units were comprised entirely of two distinct job classifications – tour guides and ticket sellers - which had little or nothing to do with each other on a day to day basis. Thus, this election did not present the usual and familiar situation where there is one union and one Employer involved in a Board administered election.⁶

It was readily ascertainable from the posture of this election that the observers in this case could not have been expected to know or be able to identify the voters who were employed by the other Employer. As Local 1212 observer, Koukou Segnibo testified, except for two or three voters whom he felt appeared “too old” to work for the company (TR:74), or somebody he personally knew did not work for the company for a long time, Nonou Ahadj (TR:67-68), he could not know if every person who came in to vote was who they said they were (TR:74). He also testified about the instructions given to the observers regarding how to have the voters identify themselves, noting that neither they nor the voters were told to present their picture id to identify themselves (TR:73).

The lack of observers’ personal knowledge of a significant number of voters and the failure to impart to them instructions as to how to identify voters was clearly shown to have a

⁵ The Teamsters represented bus drivers of the Gray Line operation, whereas drivers of the City Sights operation were, as still are, a part of the bargaining unit including the ticket agents and tour guides represented by Local 1212. The drivers are not affected by this petition, but were a part of the complexity of the merger of the corporate operations.

⁶ Notwithstanding these unusual circumstances, in informal discussions with the parties in the days prior to the election, the Board Agent in charge of the election urged the parties to have only one (1) observer each because he was concerned that there would not be room for eight (8) observers in the voting area. Local 1212 urged the Board Agent that two observers, preferably a ticket seller and a tour guide, would be needed due to the separated nature of the bargaining units. It was only after the Employers said that they would not be having an observer at the election that the Agent agreed to the Unions having two observers each. It was apparent that the accurate identification of voters was an issue even before the election.

direct impact on the election.⁷ Evidence of this impact is the Regional Director's affirmation of the Hearing Officer's recommendation to sustain the challenge to the ballot containing the name of Komlanvi Noudoukou, because despite Noudoukou's name appearing on the ballot, "[I]t is not possible to ascertain the true identity of the voter whose challenged ballot envelop bears his name." Regional Director's Supplemental Decision, p. 2. (The Hearing Officer previously concluded, "[T]he identity of the voter whose ballot is contained in the envelope in question cannot be ascertained.... [T]he identity of the challenged voter cannot be determined." HOR:24.)

The Regional Director's reliance on the right of observers to request ID from voters they did not recognize, as a ground for recommending the denial of this objection, is misplaced as a matter of law. It is not sufficient to leave to the parties' observers the obligation and/or responsibility to challenge any voter they could not personally identify. In *Avondale Indus. V. NLRB*, 180 F.3d 633,638 (5th Cir. 1999) an employer-party to an NLRB election challenged it on the grounds that the voter identification procedures were inadequate. The NLRB maintained the election result should be sustained as it used the "standard" voter self- identification system and there was no evidence of voter fraud. It also charged the observers with dereliction of their duties for any deficiency in identifying voters, noting that observers appointed by the parties "not only represent their principals but also assist in the conduct of the election." NLRB Casehandling Manual, Sec. 11310. But the Court rejected these contentions, observing that, "Voter identification procedures appropriate for representations elections in small units may be inadequate when the eligible voting pool becomes very large." *Id.*, at 636. "[T]he buck stops with the NLRB" to provide for the proper conduct of an election. *Id.*, at 637. The Court rejected

⁷ Given the large number of voters from two unintegrated bargaining units, this problem was readily foreseeable; and given the closeness of the result, there is no doubt that even a small number unidentifiable voters are significant enough to question the validity of the results.

the Board's assertion that the employer's objection should be overruled because "most voters truthfully identify themselves." *Id.*, at 639. The Court granted that this might be a true statement and was undoubtedly true even in the election under review, but said this truism lacked force for two reasons that are as apposite in the instant case as they were in *Avondale*:

First, the election contest was bitter and hostile, sure to provoke suspicion in whichever party lost. From the number of threatened challenges and the parties' inability to even agree whether large groups of employees should even be in the unit ... [the Region] should have foreseen a prolonged administrative struggle. An objective voter identification procedure would have belied suspicions, discouraged attempts at voter fraud, and averted this source of future litigation. Second, the election was close.

Id., at 639.

The *Avondale* court went on to say, "The NLRB's reliance on mere hope, unsupported by objectively verifiable voter information, raises a reasonable doubt as to the fairness and validity of the election." *Id.*, at 640. On these bases, the Court ordered the matter remanded to the NLRB with instructions to set aside the election.

The facts and problems requiring a new election in *Avondale* were also present in this case. Local 225 announced just days before the election its intent to challenge nearly a third (32%) of Local 1212's membership because they did not belong in the bargaining unit – a tactic that caused disruption in the election and a baseless position from which it belatedly withdrew. There was a history of contentious litigation between these parties, evidenced by the hotly contested UC petition that Local 225 was forced to withdraw only a short time before filing this petition. This election was a fight for representation of two heretofore large and separately represented bargaining units. And in the end, the vote is so close that it may be decided by just one or two votes.

With these principles and facts in mind, the Regional Director ignored the plain language of the Case Handling Manual and wrongly distinguished *Avondale* and rejecting Election Objection 2 in finding:

- (a) “...the record indicates that the Intervenor’s challenged voters and requested identification from some voters.” (p. 3)

This apparent effort to transfer the primary obligation to properly identify voters to observers is contrary to the clear mandate of the Case Handling Manual and the holding in *Avondale*. It also ignores the uncontroverted testimony in the record by Local 1212 observer, Koukou Segnibo, that except for somebody he personally knew did not work for the company for a long time, Nonou Ahadj (TR:67-68), he could not know if every person who came in to vote was who they said they were (TR:74). It also ignores Segnibo’s testimony about the instructions given to the observers by the Board Agent in the pre-election conference regarding how to have the voters identify themselves, noting that neither they nor the voters were told to present their picture id to identify themselves (TR:73).⁸

- (b) In contrast, here, while the unit is large, the circumstances surrounding this election did not warrant a directive from the Regional Director to require additional identification, nor does any reported conduct at the election, support the need for objectively, verifiable identification.

While acknowledging the unit was large, the Regional Director’s after the fact conclusion that that there was no need for objectively verifiable identification in this case ignores the record and reality of the situation. It ignores the complexities learned in the investigation of the UC petition. It ignores that all voters in this case could easily have presented verifiable identification because all of the employees of both employers involved are issued picture id cards to have on

⁸ Reference to the transcript of the hearing are indicated by “TR-___”.

their person while working on the streets. It ignores the failure to even pay lip service to the command of the Case Handling Manual to engage in a discussion with the parties of the issue of proper identification of voters. It ignores the fact that with respect to at least three challenged ballots (Noudoukou, Koukou and the Delarosa brothers) voter identification was at the heart of these challenges. Thus, to conclude that there was no support for requiring objectively verifiable identification evades the Region's primarily obligation to consider the matter and review it with the parties in advance of the election, recognize the ease with which such identification could have been secured, and acknowledge the impact the failure to require such readily available identification has already had on the election.

It is clear that the failure to implement adequate measures to ensure proper voter identification in this case has destroyed the laboratory conditions required of Board sponsored elections and the Regional Director's decisions in this regard require review by the Board.

Point 2. The Regional Director Departed from Board Precedent in Overruling Intervenor's Third Objection

The Intervenor's third objection to the election states:

A Local 225 observer instructed voters to fill in the ballot by marking off the space for Local 225.

The Regional Director erred in sustaining the Hearing Officer's finding and overruling Intervenor's third objection by finding:

- (a) That the instant record demonstrates that the observer's comment was isolated and in response to a chance inquiry by a voter. Page 4.

While the objectionable comment by the observer may have been made only once, it surely was not isolated as it was made within hearing distance of as many as seven other voters waiting on line to vote. The Regional Director has not rejected the Hearing Officer's conclusions

that the observer's conduct met two of the three prong test of objectionable conduct under the *Boston Insulated Wire* test. Thus, the observer's conduct occurred in the polling place and was engaged in while acting as petitioner's observer. Hearing Officer's Report, p.35. The record evidence of uncontroverted testimony of Local 1212 observers, Koukou Segnibo and John Porier, whose testimony was credited by the Hearing Officer, established that the other voters could hear what was being said. TR-76. Thus, while perhaps being a single comment, given the circumstances in which it was made, it surely was not isolated. Given the closeness of this election, even this lone comment which could be overheard by others waiting to vote has spoiled the laboratory conditions required for this election.

(b) "Thus irrespective of whether other voters overheard the interaction, the conduct was no prolonged or so egregious as to warrant setting aside the election." Page 4

This reference to being prolonged is similar to the mistaken conclusion that it was isolated. Just as it was not "isolated" when it could be heard by a significant number of voters waiting on line to vote; it was also prolonged because of this publication to many other voters. Moreover, it was egregious (*Boston Insulated Wire* uses the terms "extent and nature") because, different voters on line may have derived different impressions of what they saw or heard when they observed the Local 225 observer respond to a question of "Where do I vote?" by pointing to ballot and say "here" or "there". There is no way of knowing if the other voters knew the person asking the question, knew that he was visually impaired, or understood the context in which the question was asked or answered by the instruction of where to vote. Thus, the behavior of this observer in the busy polling place cannot be dismissed as isolated and not serious; rather it had a "nature and extent" that could have directly affected the behavior of the other voters on the line.

- (c) That, “Cleary, the record demonstrates that the observer was responding to a voter, not initiating the interaction, with a comment that was brief, innocuous and isolated.

This finding misses the entire point of the third Objection. The focus of this Objection does not concern the observer’s motivation or interaction with the particular voter who asked a question. It concerns the impressions of the other voters in the vicinity who may not have heard the entire colloquy between the observer and the person asking the question, but who may have been given an unlawful communication by an observer telling people where and how to vote. Helping a voter with a particular question – even though the better response would have been to call over the Board Agent or refer the voter to the Board Agent for assistance and not engage with the voter on such matters - is not the gravamen of this objection. The Regional Director’s finding ignores the implications of the observer’s conduct on other voters.

- (d) That, “Further, the record shows that potential voters would have had to see and hear the interaction to conclude that the observer was soliciting a vote for the Petitioner.”

The Regional Director’s mistake here, of course, like her error in statement (c), above, is that a voter on line may only have seen and heard the observer hold up the ballot and say “vote here” or simply “here” or “there” while pointing to the ballot to believe they were being solicited to vote and that the observer was engaged in electioneering. The Regional Director’s undivided focus on the interaction between the observer and the voter asking the question, to the exclusion of the full or only partial observations of that interaction by the other voters on line, informs her mistaken conclusion that there was no violation of *Boston Insulated Wire* in this scenario.

Conclusion

The Regional Director erred Factually and legally in her application of the Board’s Case Handling Manual, Board precedent and applicable case law concerning the failure to ensure the

proper identification of voters in this election and the effect of Petitioner's observer's misconduct in the polling place during the election.

The Board should not permit the Regional Director's errors to survive as the integrity of and public confidence in the Board's processes are seriously implicated by this decision. The Board should take review and should clarify the role of the Regions in conducting elections in large, complex, contested cases and confirm its precedent on improper voting place electioneering.

Dated: Elmsford, New York
June 7, 2016

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2016, I electronically filed this REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION ON OBJECTIONS AND CHALLENGES AND DIRECTING THE COUNTING OF BALLOTS through the National Labor Relations Board website system which will send notification of such filing to e-mail address for the following:

Executive Secretary
National Labor Relations Board
Washington, D.C.

and I hereby certify that I have served the document by e-mail and first class mail to the following as indicated:

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